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No. 93-964

In the Supreme Court of the United States

OCTOBER TERM, 1993

CONSOLIDATION COAL CO., PETITIONER

v.

JOSEPH J. SKUKAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

In adjudicating claims for benefits under the Black Lung Benefits Act, the Department of Labor has long applied a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question presented is whether use of the "true doubt" rule is permissible under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), and relevant Departmental regulations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-28) is reported at 993 F.2d 1228. The decisions and orders of the Benefits Review Board (Pet. App. 29-34) and the administrative law judge (Pet. App. 35-55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993, and a petition for rehearing was denied on August 24, 1993 (Pet. App. 1-2). On November 9, 1993, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including

December 17, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1983, after 37 years of coal mine employment, Joseph Skukan filed an application with the Department of Labor for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* Pet. App. 36-38 & n.2. Petitioner is the mine operator responsible for paying any benefits awarded under the statute. *Id.* at 38. In 1988 an administrative law judge (ALJ) denied benefits under the Department's regulations applicable to claims filed after March 31, 1980. *Id.* at 35-55; see 20 C.F.R. Pt. 718. The ALJ concluded that although the claimant had pneumoconiosis and suffered from a totally disabling respiratory or pulmonary impairment, the evidence failed to show that the disease caused the impairment. Pet. App. 41-54.

In finding the existence of pneumoconiosis, the ALJ considered seven positive and fourteen negative x-ray readings, all obtained between 1971 and 1987. Pet. App. 40-41. Because pneumoconiosis is a progressive disease, the ALJ gave the greatest weight to four readings of two x-rays taken in 1987. *Id.* at 41. Two of those readings were positive, and two negative; of those rendered by readers who were Board-certified radiologists or B-readers,[1] one was positive and two

[1] B-readers are physicians who have been specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 145 n.16 (1987). "Board-certified" means certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. 718.202(a)(1)(ii)(C).

negative. *Id.* at 41-42. The ALJ stated that on the record he was left with a "true doubt" as to whether the claimant had pneumoconiosis, and he resolved that doubt in favor of the claimant. *Id.* at 42.

The ALJ found "overwhelming" evidence that the claimant was disabled due to a respiratory condition and could not return to his work as a coal miner.[2] Pet. App. 53. Relying on medical opinions submitted by petitioner, however, the ALJ determined that the claimant's totally disabling respiratory condition could be "attributed to his obesity and cigarette smoking." *Id.* at 54. The ALJ concluded that those opinions outweighed two others submitted by the claimant, because one of the claimant's doctors had not considered the claimant's smoking history in identifying a nexus between pneumoconiosis and the claimant's total disability, while the other doctor's report did not identify such a nexus at all. *Id.* at 53-54.

The Department of Labor's Benefits Review Board affirmed. Pet. App. 29-34. It concluded that the ALJ had permissibly found "true doubt" concerning the existence of pneumoconiosis, and thus resolved the issue in favor of the claimant. *Id.* at 33. The Board also concluded, however, that the ALJ had permissibly weighed the medical evidence in finding that pneumoconiosis did not cause the claimant's totally

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[2] A miner is considered totally disabled if he cannot do his usual coal mine work or work comparable to it. 30 U.S.C. 902(f)(1)(A); 20 C.F.R. 718.204(b). In this case, the claimant, who had an eighth-grade education, worked as a general laborer. In that capacity he was required to walk up to one mile each day and to assist in setting 15-foot timbers that weighed 90 pounds per foot. Pet. App. 38-39.

disabling respiratory or pulmonary impairment. *Id.* at 31-32.

The court of appeals reversed. Pet. App. 2-28. It first observed that a claimant is totally disabled due to pneumoconiosis if his disability is due "at least in part" to the disease.[3] *Id.* at 9 (citation omitted). Applying that standard, the court concluded that the ALJ had improperly read one of the claimant's medical opinions as not providing a nexus between pneumoconiosis and his disability, when in fact the report "clearly and explicitly deal[t] with the disability causation." *Id.* at 11. The court also determined that the ALJ had given too much weight to petitioner's medical opinions, because those opinions were premised on findings that the claimant was not disabled and did not have pneumoconiosis. *Id.* at 12. Because those findings were contrary to the ALJ's assessment of the evidence, the court reasoned that the reports' additional conclusions concerning causation were "of little help to the analysis." *Ibid.* The court therefore held that the claimant had satisfied his burden of proving that his disability was caused by pneumoconiosis. *Id.* at 13.

The court of appeals also upheld the ALJ's use of the "true doubt" rule to find the existence of pneumoconiosis. Pet. App. 13-27. The court found the rule to be consistent both with Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), and with the Department of Labor's regulations. First, the court reviewed this Court's decision in *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987),

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[3] The court agreed with the ALJ that the evidence that the claimant was totally disabled within the meaning of the applicable regulations was "overwhelming." Pet. App. 28.

which had referred to the "true doubt" rule in construing the Department's earlier "interim presumption" regulation,[4] and agreed with the Seventh Circuit that "[f]ar from casting doubt on the true doubt rule," the Court in *Mullins* had "treat[ed] the rule as a reasonable interpretation of the regulations." Pet. App. 17 (quoting *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 712 (7th Cir. 1993), petition for cert. pending, No. 93-935 (filed Dec. 10, 1993)); see also Pet. App. 19 (characterizing the Seventh Circuit's reading of *Mullins* in this respect as "persuasive, correct and applicable to [the current regulations] as well").

The court further held (Pet. App. 18-27) that the "true doubt" rule is consistent with the generally applicable preponderance-of-the-evidence standard under Section 7(c) of the APA, 5 U.S.C. 556(d). Again agreeing with the Seventh Circuit in *Freeman United*, the court concluded that the "true doubt" rule does not impose a lower standard of proof, but rather represents "nothing more than a judicial assignment of the burden of persuasion to the employer." Pet. App. 18 (quoting *Freeman United*, 988 F.2d at 711). The court viewed such an assign-

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[4] The interim presumption regulation, 20 C.F.R. 727.203, applies only to claims filed with the Department of Labor before April 1, 1980. It affords a presumption of eligibility to a miner who has at least ten years of coal mine employment and meets one of four medical requirements. See *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2528-2529 (1991); *Mullins Coal*, 484 U.S. at 139. In *Mullins*, this Court held that a claimant could not automatically invoke the interim presumption by presenting any one item of qualifying evidence, but instead must prove the facts necessary for invocation by a preponderance of the evidence. 484 U.S. at 146-161.

ment as permissible because the APA requires the claimant to bear only a burden of production, and the "true doubt" rule does not relieve a claimant of that burden. Pet. App. 20-24 (citing *Freeman United*, 988 F.2d at 711; *NLRB* v. *Transportation Management, Corp.*, 462 U.S. 393, 403 n.7 (1983)). The court also concluded that the "true doubt" rule furthers the legislative goal of resolving doubts in favor of claimants (Pet. App. 19 & n.8), and is consistent with the Department's current regulations (*id.* at 24-25). Finally, the court noted that both the Benefits Review Board and the courts of appeals have used the "true doubt" rule to resolve conflicts involving contradictory but otherwise equally probative x-ray evidence. *Id.* at 25-26.

Having upheld the "true doubt" rule, the court determined that the ALJ had permissibly applied that rule to the x-ray evidence in this case. Pointing out that the evidence included conflicting readings by several B-readers and Board-certified radiologists, including conflicting readings of the most recent x-rays, the court found that the ALJ had "considered the conflicting X-ray evidence and the qualifications of the physicians interpreting the X-rays, accorded greater weight to the most recent X-ray evidence, and permissibly found that true doubt existed on the issue of the existence of pneumoconiosis." Pet. App. 27. The court accordingly concluded that substantial evidence supported the ALJ's invocation of the "true doubt" rule to resolve the issue in favor of the claimant. *Ibid.*

ARGUMENT

The principal question presented in this case is the same as that presented in the government's pending

petition for a writ of certiorari in *Director, OWCP* v. *Greenwich Collieries* and *Director, OWCP* v. *Maher Terminals*, No. 93-744 (*Greenwich Collieries*), concerning the validity of the "true doubt" rule that the Department of Labor applies under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, and the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*[5] In the decisions at issue in *Greenwich Collieries*, the Third Circuit held that the "true doubt" rule is inconsistent with Section 7(c) of the APA and the Department's current regulations under the BLBA. In this case, the court of appeals held that the rule does not conflict with Section 7(c) or with those regulations.

As we explain in our petition in *Greenwich Collieries*, the "true doubt" rule is consistent with both the BLBA and the APA, and the conflict among decisions of the courts of appeals regarding its validity warrants review by this Court. *Greenwich Collieries*, however, offers a better vehicle for review than does this case. The petition in *Greenwich Collieries* presents the question under both the LHWCA and the BLBA, while this case presents the question only under the BLBA. In addition, the petition in this case also presents (see Pet. i) two factbound questions that do not independently merit

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[5] The same question is presented by the pending petitions in *Santoro* v. *Maher Terminals, Inc.*, No. 93-474 (which also seeks review of one of the decisions involved in *Greenwich Collieries*), and in *Freeman United Coal Mining Co.* v. *Jones*, No. 93-935. The petitioner in *Freeman United* has requested that its petition be held pending a decision on the petition in *Greenwich Collieries*. 93-935 Petitioner's Motion to Hold Ruling on Petition for Certiorari in Abeyance (served Dec. 16, 1993).

review, but that could, if reached, make it unnecessary to determine the validity of the "true doubt" rule.[6] We therefore suggest that the Court hold this petition pending disposition of the petition in *Greenwich Collieries*. We note that petitioner consents (Pet. 11) to holding this case in abeyance pending resolution of the issues presented in *Greenwich Collieries*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition in *Director, OWCP* v. *Greenwich Collieries* and *Director, OWCP* v. *Maher Terminals*, petition for certiorari pending, No. 93-744.

Respectfully submitted.

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[6] Petitioner "reserves the right to argue" (Pet. i) that the court of appeals erred in affirming the ALJ's determination that the x-ray evidence was in equipoise and in reversing the ALJ's determination that the claimant's disability was not caused, even in part, by pneumoconiosis. A finding either that the claimant did not have pneumoconiosis or that the disease caused no disability would result in a denial of benefits, regardless of the validity of the "true doubt" rule. See Pet. App. 31.